

February 8, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Jeremy Bigwood

Date of Filing: September 20, 2006

Case Number: TFA-0175

On September 20, 2006, Jeremy Bigwood filed an Appeal from a determination issued to him on August 24, 2006, by the Office of Policy and International Affairs (OPIA) of the Department of Energy (DOE). ^{*}/ That determination concerned a request for information that Mr. Bigwood submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, DOE would be ordered to release the information withheld and to search for additional responsive documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public, whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Mr. Bigwood filed a FOIA request seeking documents that pertain to Hugo Chavez, President of Venezuela, and documents pertaining to Venezuela as a petroleum supplying country and OPEC member. *See* Appeal Letter at 1. On August 24, 2006, OPIA issued a determination which stated that it conducted a search of its files for responsive documents. According to OPIA, that search located 66 responsive documents. Thirty-five of those documents were provided to Mr. Bigwood in their entirety and 31 were provided with deletions pursuant to Exemption 5 of the FOIA. The Determination Letter stated that the withheld material is “pre-decisional” and “deliberative.” *See* Determination Letter (August 24, 2006) at 1.

* The FOIA and Privacy Act Group of the DOE served the administrative function of providing Mr. Bigwood a response that identified OPIA as the office that conducted a search for responsive documents.

On September 20, 2006, Mr. Bigwood filed the present Appeal with the Office of Hearings and Appeals (OHA). In his Appeal, Mr. Bigwood challenges OPIA's determination, asserts that material was improperly withheld under Exemption 5 and asserts that DOE failed to perform an adequate search. *See* Appeal Letter at 3-5. For these reasons, Mr. Bigwood requests that OHA direct OPIA to release the requested information.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding portions of documents from Mr. Bigwood, OPIA relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears*, 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id.*

After reviewing the requested documents at issue, we have concluded that the determination made by OPIA in applying Exemption 5 was correct and consistent with the principles outlined above. The information withheld from Mr. Bigwood consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use. The information requested in this case properly falls within the definition of "intra-agency memoranda" in the FOIA. The comments, recommendations and opinions contained in the material are clearly predecisional and deliberative. They discuss proposed actions in hypothetical scenarios about oil production and contain recommendations for items to discuss at meetings related to Venezuela. In addition, the comments and recommendations reflect draft opinions on issues related to action by Venezuela. These comments and recommendations were subject to further agency review and do not represent final agency position. Accordingly, we hold that the comments, recommendations and opinions

withheld from the responsive material were properly withheld under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consist solely of advisory opinions and recommendations provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Adequacy of Search

When an agency conducts a search under the FOIA, it must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Department of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Ms. Doris M. Harthun*, 28 DOE ¶ 80,282 (2003); *David G. Swanson*, 27 DOE ¶ 80,178 (1999).

In the present case, Mr. Bigwood asserts that the search was inadequate and that there are several documents missing from the material. He further asserts that "there are no documents concerning the April 2002 coup against President Chavez, which DOE surely noticed even though it took place over a weekend." Appeal Letter at 1. He requests that DOE "search through your archives again paying special attention to any DOE documents or any other media produced during April 2002, which I believe you must have." *Id.* In response to Mr. Bigwood's Appeal, we contacted the FOIA and Privacy Group of DOE (FOIA Group) to determine the scope of the search. The FOIA Group referred us to the OPIA because that office conducted the search and it is the office most likely to contain responsive material. *See* Record of Telephone Conversation between Abel Lopez, FOIA Group, and Kimberly Jenkins-Chapman, OHA (December 21, 2006). The OPIA informed us that it conducted a very long, extensive search of all of the files related to Mr. Bigwood's request. It stated that it located information Mr. Bigwood sought in his request, but that information was among the material identified in the Determination Letter as exempt under Exemption 5. In addition, the OPIA stated that no other relevant responsive material exists that was not addressed in its

Determination Letter. *See* Record of Telephone Conversation between Andrea Lockwood, OPIA, and Kimberly Jenkins-Chapman, OHA (January 18, 2007).

Given the facts presented to us, we find that the OPIA conducted an adequate search which was reasonably calculated to uncover documents responsive to Mr. Bigwood's request. Accordingly, Mr. Bigwood's Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Jeremy Bigwood, OHA Case No. TFA-0175, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
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Office of Hearings and Appeals

Date: February 8, 2007